88-1999

Supreme Court, U.S.
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JUN 5 1989
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CLERK

No.

IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1988

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WILLIE L. HARRIS AND DOROTHY HARRIS,
*Petitioners,*

*vs.*

STEELWELD EQUIPMENT COMPANY, INC.
*Respondent.*

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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June 4, 1989

## QUESTION PRESENTED

Does a defense counsel's closing argument, unsupported in the Record, that the plaintiffs' trial counsel fraudulently contrived the case, and that the jury, as the community conscience, should "send a message" of disapproval by answering "No" to the special verdict form controlling liability, require reversal of defendant's judgments so obtained?

## PARTIES TO THE PROCEEDINGS

The caption identifies all parties to the proceedings in the District Court and Court of Appeals.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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The petitioners Willie L. Harris and Dorothy Harris, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on March 6, 1989.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 869 F.2d ~~869~~ 396 and is re-printed in its original form in the Appendix, p. A-1.

The judgment of the District Court has not been reported. It is reprinted in the Appendix, at p. A-~~30~~ 29.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

No statutes or rules are involved.

## STATEMENT OF THE CASE

### A. Nature Of The Case

This diversity action by the husband and wife plaintiffs, Illinois residents, sought damages on account of a disabling back injury incurred by the truck driver husband when, while making a delivery to the Missouri defendant's plant, he slipped and fell on an unnatural accumulation of snow and ice.

### B. Facts Of The Case

On February 11, 1980, Plaintiff, Willie L. Harris, was employed by Complete Auto Transit, Inc., as an over-the-road carrier driver, transporting new automobiles and light trucks to businesses in Missouri and other states. Plaintiff was required to load and unload the seven vehicles that his carrier held, as well as to drive the

carrier. The loading/unloading required climbing, crawling, bending, twisting and reaching in order to put on and take off the various undercarriage tie-down chains used to keep the vehicles secure during transport. Also, putting up and taking down the metal drive ramps, tightening the tie-down chains, etc., required lifting and above and below waist-level exertion.

The defendant, Steelweld Equipment Company, Inc., was in the business of building and installing custom utility bodies on light trucks delivered to its St. Clair, Missouri plant, via carrier, from the truck manufacturer.

**Prior Back Injury**

In October 1977, while driving for Complete Auto Transit, Inc., Plaintiff strained his back while tightening a tie-down chain. He was examined and treated,

with physical therapy, by Dr. Jatala, the employer's workers' compensation doctor, in 1977 and, later, on two occasions in June and October 1978, when the condition flared up.

Plaintiff's 1977 back strain caused pain and soreness in his left hip and buttock region, and sometimes down into his left thigh. Although the soreness recurred, or "flared up," on occasions after the 1977 injury, each event was briefer than the preceding: Plaintiff missed 24 days of work in 1977 because of the back strain, 14 days in 1978, and no days in 1979. At the time of his fall on the snow and ice at Defendant's unloading or receiving zone, on February 11, 1980, he had no back-related time off from work in the prior 15 months.

**Defendant's St. Clair Premises**

During the ten days before February 11, 1980, central and eastern Missouri snow reporting stations recorded three or more separate snowfalls leading to snow on the ground accumulations on February 11 from 3 to 7 inches. St. Clair had no snow reporting station, but at Union Missouri, six miles north of St. Clair, 5 inches of snow covered the ground by February 11.

On February 11, 1980, Defendant's St. Clair plant's rear parking lot was covered over with a frozen, crusted-snow surface interrupted with packed-down truck ruts and tire tracks, and showed no evidence of having been plowed, salted or spread with cinders. Defendant had cinders and salt supplies on the premises and owned a four-wheel drive snow plow.

At the front of Defendant's St. Clair plant, the visitors' automobile parking area and drive had been cleared off of all snow and ice and was dry, as were the streets and roads in the vicinity of the plant.

**The Injury**

Upon arriving at Defendant's St. Clair plant and seeing the snow and ice-packed condition of Defendant's rear parking lot, Plaintiff parked his carrier on the street in front of Defendant's plant and began to unload vehicles there, rather than on the rear lot. While doing so, Plaintiff was stopped and instructed by Defendant's lead man, Mr. Enke, whose authority it was to accept and sign for delivered vehicles, to unload on the rear lot, or else he would not accept delivery. After some argument about the conditions of Defendant's rear

lot, Plaintiff drove his carrier around to the plant's unloading or receiving zone.

After unloading, and while walking from his carrier's cab to Defendant's office, avoiding the ice-packed ruts and glazed areas by stepping on snow that looked to be uncompacted and "crunchy," Plaintiff suddenly slipped and fell backwards, landing hard on his low back and buttocks. Defendant's lead man, Mr. Enke, and another carrier driver, Mr. Guggenberger, saw Plaintiff on the ground in front of the cab of his carrier, came to his aide and, after a few moments, helped him up.

Despite severe pain in his low back, Plaintiff continued his deliveries that day, thinking that the pain would abate. Taking aspirin and rests along the way, Plaintiff completed his deliveries and returned home where he soaked in a hot

tub, took aspirin and went to bed.

On February 12, Plaintiff's back was hurting him, but he loaded his carrier during the morning with vehicles for the next day's trip to Memphis, Tennessee, and rested the remainder of the day. During the subsequent round trip to Memphis, his back pain became unmanageable, requiring him to go off duty, or pull off the road to lie down. The pain was in his low back and down both legs. The stops delayed his arrival home until the morning of Friday, February 15.

**Treatment And Disability**

Upon his return to the terminal from Memphis, on February 15, Plaintiff went off work because on his back injury and began treating with a chiropractor. When, after two weeks of chiropractic treatment he felt only worse, Plaintiff's employer

arranged for him to see the company's doctor, Dr. Jatala. Upon examining him, Dr. Jatala suspected that Plaintiff had ruptured a lumbar disc and immediately referred him to Dr. Cole, a neurosurgeon.

Dr. Cole admitted Plaintiff to the hospital on March 10, 1980 for a myelogram which showed a herniated lumbar disc at the L4-5 level. Plaintiff was admitted for surgery on April 11, 1980, and Dr. Cole removed herniated disc material from the L3-4 and L4-5 interspaces.

Dr. Cole has never released Plaintiff to return to his former work as a carrier driver. Plaintiff attempted sedentary level work as a cash clerk, in November 1983, but left the job after only three days when the prolonged sitting periods exacerbated his subjective and objective symptoms, prompting Dr. Cole to perform a

repeat myelogram and to try to further compress the disc by chemonucleolysis.

Following chemonucleolysis, the pain and symptoms diminished only briefly. Dr. Cole opines that Plaintiff can never go back to his former occupation and that he knows of no other treatment or procedure that may enable him to do so.

Neurologist, Dr. Hanaway, who treated Plaintiff post-surgically, believes that, he is incapable of full-time competitive employment.

Since about June 1986, Plaintiff has been working part-time as an assistant minister at a St. Louis Baptist church.

### C. In The District Court

Plaintiffs' action was commenced on January 21, 1985, and was reached for jury trial on November 9, 1987.

During the case, David Kutchback, a vocational rehabilitation expert witness appearing for Plaintiffs, testified that he first evaluated Plaintiff, in December 1981, and determined that, pursuant to the physical restrictions placed on him by Dr. Cole, that he was incapable of competitive employment at that time. In response to a hypothetical question based on medical testimony at trial time that 1) his back injury prevented Plaintiff from sitting or standing for more than 1-2 hours at a time and necessitated that he be able to lie down periodically during an eight-hour work day to relieve back pain, and 2) the failure of Plaintiff's November 1983 trial in a sedentary job, Kutchback opined that Plaintiff is not competitively employable.

On cross-examination of Mr. Kutchback, defense counsel developed that, in 1983,

Mr. Kutchback, by letter to Plaintiff's attorney, Mr. Nelson, by whom he was first engaged to evaluate Plaintiff, suggested that he meet with Dr. Cole to find out what specific functional limitations he imposed on Plaintiff at that time so that Kutchback could evaluate whether or not anything further, by way of vocational rehabilitation, might be available for Plaintiff. Over objection, and on defense counsel's assertion that it went to the credibility of Kutchback, defense counsel developed that Kutchback had received back a letter from Nelson stating, "we really don't want to set aside what we have been fortunate enough to obtain for this man (Social Security award)," and instructing Kutchback to put his file on hold.

In his closing statement to the jury, Defendant's counsel argued:

"He gets lawyers. He gets a doctor. He even gets a rehab expert. And when I say 'he,' what happens sometimes, ladies and gentlemen, is that somebody that may have been an honest person or somebody who went in and was simply seeking some treatment and wanted to get better, all of a sudden, some lawyers get involved, and their getting better takes a side seat to maybe winning a lottery.

And after the lawyers get involved, then it's, I didn't have any problem before, then I was fine, I was fine.

* * *

Then he gets, the plaintiff's lawyer gets what they call a rehabilitation specialist, Mr. Kutchback.

I'll say this for Mr. Kutchback, at least he was honest enough to fess up to what was attempted to be done.

MR. KASEBERG: I object, Your Honor. I don't know if that's an accusation against me, my client, or what.

MR. WATTERS: You'll know what the accusation is when I'm ready to level it, all right? What I'm talking about here, ladies and gentlemen, is a rehab specialist hired by plaintiff's attorney. The rehab specialist tells the

plaintiff's lawyer, look, I think I can get this guy back to work.

What does he do, what does this Mr. Nelson do? Mr. Nelson takes him, he takes him off--

MR. KASEBERG: Your Honor, that has nothing to do with this case.

THE COURT: Be overruled. Let's proceed. The jury will have to recall the testimony.

MR. WATTERS: Mr. Nelson takes the guy off the case, as I put it, he fires him, says I don't want you to put him back to work, keep him off work, don't let him work; the lottery, ladies and gentlemen.

They want to come in here, be able to throw figures up like this, so keep the guy off work. What's the guy supposed to do?

I don't necessarily blame Mr. Harris. What's he supposed to do? He's got the lawyers telling him don't go back to work, we can relate this up to an incident you say happened at Steelweld Equipment, and we'll go to a jury and ask them to give you two million dollars, we take our percentage, you go home, and we'll give you a good shake.

* * *

It's a difficult thing to do, but I'm asking you to do that, write "No" and you send the message, I'm not only talking about this little court room with these people, I'm

> telling you that if this goes out, you've set the standards for our community. You six people will set the standards in this case and the next case that's tried. These are the standards that are set, and I'm asking you to please do the difficult thing, ladies and gentlemen, write down simply "No" on that verdict form."

As requested, the jury returned the liability-controlling special verdict form containing the answer, "No," and the trial court entered judgments for Defendant and against Plaintiffs.

Plaintiffs' Rule 59 motion for a new trial was denied on March 24, 1988.

### D. In The Court Of Appeals

Plaintiffs' notice of Appeal was filed April 22, 1988.

On appeal, the Eighth Circuit sustained the District Court's judgments, concluding that Defendant's closing argument was not

objectionable. The decision held that Defendant's argument, that Plaintiffs' trial counsel fraudulently contrived the case, was amply supported in the evidence by 1) a "fair and proper inference" from Mr. Kutchback's testimony concerning the letter he received from Plaintiff's former attorney, Mr. Nelson, that "in 1983,... (Plaintiff) by and through his agent, Mr. Nelson, was thwarting any effort to secure employment for himself," and that he "was not going to risk a finding of employ-ability, even if he were in fact employ-able" (p. A-24, *infra*), and 2) medical evidence that there was "some doubt" as to whether Plaintiff was hurt on Defendant's property[1] (p. A-24, *infra*).

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[1]The opinion's implicit acceptance of Defendant's brief's unsupported argument that Plaintiff did not report the fall in question to two of his treating doctors and told surgeon Cole that he had fallen somewhere else, ignores the Record's establishing that, of the three treating doctors, Drs. Jatala's and Hanaway's testimony

As to the error assigned by Plaintiff to Defendant's follow-up argument that the jury, as the community conscience, should "send a message" of disapproval by answer to the special verdict form controlling liability in the case, the appellate court held there to be no plain error because, while it would have been condemnable for Plaintiff to have made the argument in the case, the prohibition did not apply to a defense attorney.

Accordingly, the Court of Appeals affirmed the District Court's judgments in favor of Defendant.

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reflect the history of the 2/11/80 fall given to them by Plaintiff, and that Dr. Cole testified that, not only did he understand the records he received from Sutter Clinic (Dr. Jatala) as referencing the fall in question, but he recognized a history note recorded by another doctor upon Plaintiff's first hospital admission, about a 2/11/80 fall "on ice at St. Clair Implement Company," to refer to the accident in question at Defendant's St. Clair plant premises. No fall by Plaintiff, except the 2/11/80 fall, appears anywhere in the Record.

## REASON FOR GRANTING THE WRIT

**The Eighth Circuit's Approval Of The Defendant's Argument (a) So Far Sanctions A Departure From The Accepted Standards Of Judicial Process As To Require Exercise Of This Court's Power Of Supervision, And (b) Conflicts With The Decisions Of This Court And This And Other Circuits.**

The Eighth Circuit has fashioned and published a metastic new code of attorney conduct in jury trials that threatens the foundation of judicial process by denying civil litigants the right to a fair trial on the merits of their case.

The Court of Appeals' endorsement, in the case at bar, of jury trial closing arguments accusing the opponent's trial counsel of fraudulently contriving the case, supported by only a) a particularly

improper inference and b) the existence of "some doubt" as to the adequacy of the Plaintiffs' proof of causation, followed by "community conscience" and "send a message" incitement, not only has produced a terrible miscarriage of justice in the case at bar, but without this Court's exercise of supervision, will greatly proliferate the incidence of such abuses by throwing open the District Court doors to gutter tactics used by the breed of unprincipled litigators whose swelling numbers already alarm the profession.[2]

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[2]"The unfair, abusive and unethical tactics of the 'S.O.B.' litigator cause concern among those monitoring the ethical standards of the bar." These litigators "pursue victory at any cost (through) demeaning and rude behavior...spurious objections ...unfair opening and closing statements....(and) a host of other disreputable and nefarious litigation techniques....and try to cast their conduct as 'zealous advocacy.'" *Dealing With The S.O.B. Litigator*, an ABA Satellite Seminar broadcast presentation, Michael E. Tigar, faculty moderator, sponsored by the American Bar Association, Section Of Litigation and the American Bar Association, Division For Professional Education (May 11, 1989).

While it long has been recognized that juries, and the public at large, are very skeptical of the honesty and ethics of lawyers, it is frightening to imagine the disrepute that would result if courtrooms became bitter battlegrounds where opposing attorneys had license to slander and revile each other's character; where every expression of a different view of the evidence or any question of a witness' veracity produced unrestrained angry denouncements of the other party's trial counsel as a liar, scoundrel or fraud. This Pandora's box has been held shut until now by the decisions of this Court, other circuits and prior decisions of this circuit that condemn such arguments in any but the exceptional case where very clearly warranted by the evidence. *See, e.g., New York Cent. R. Co. v. Johnson,*

279 U.S. 310, 318-319 (1929)(bitter and passionate attack on petitioner's conduct of the case was plain error); *Robinson v. Pennsylvania R. Co.*, 214 F.2d 798, 802 (3rd Cir. 1954) (flagrantly abusive statements and accusations against opposing counsel and client were plain error); *Chicago & N.W. Ry. Co. v. Kelly*, 84 F.2d 569, 576-577 (8th Cir. 1936)(unjustified argument that opponent's case was fraudulent or trumped up, reversed); *F.W. Woolworth Co. v. Wilson*, 74 F.2d 439, 442-443 (5th Cir. 1934)("The fact must be very plain to ever justify a lawyer in declaring his opponent's case to be trumped up," reversed). The opinion in the case at bar, in conflict with those decisions, has now pried up the lid of that box. The supervisory power of this Court is needed to nail the lid back down securely.

### A. No Inference of Fraud

The Eighth Circuit's decision does not establish, and the Record does not reflect any reasonable basis for an inference warranting argument that Plaintiffs' trial counsel had fraudulently contrived the case.

1. Assuming only for argument's sake the legitimacy of inferring an intention by Plaintiff's former counsel[3] to falsely extend the appearance of Plaintiff's work disability for purposes of a collateral source claim, there was still no basis for the Defendant's argument that Plaintiff's

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[3]Mr. Nelson, a Belleville, Illinois attorney and Plaintiff's former lawyer in his Illinois workers' compensation and Social Security claims arising out of the 2/11/80 fall at Defendant's plant, was not associated in any fashion with Plaintiff's trial counsel and had no involvement or participation in Plaintiffs' district court case.

trial counsel in the district court had acted fraudulently to contrive any aspect of the litigation then before the jury. Neither Defendant nor the Eighth Circuit's decision has cited any fact or inference that might vaguely warrant Defendant's scurrilous, defamatory and extremely prejudicial attack on the trial counsel against whom it was "levelled."[4]

2. Notwithstanding point 1, *supra*, the inference from lawyer Nelson's letter relied on by the Eighth Circuit's decision is not "fair and proper"[5] because there is no evidence in the Record establishing that when lawyer Nelson wrote his letter,

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[4]Defense counsel's rhetoric, p. A-21, Note 11, *infra*.

[5]Court of Appeals decision, p. A-24, *infra*.

Plaintiff was, in fact, employable[6] and that Nelson knew it.

Though Defendant argued, that Kutchback told Nelson, "Look, I think I can get this guy back to work (pp. A-21 - A-22, Note 11, *infra*)," that characterization is a misstatement of Kutchback's testimony and ignores Kutchback's explicit denial that he said that to Nelson, or formed such an opinion. And, the Eighth Circuit's conclusion that Kutchback had "indicated that it was a possibility that (Plaintiff) could be employable (emphasis added)(p. A-20, Note 10, *infra*)" or that he "might be capable of employment (emphasis added) (p.A-24, Note 12, *infra*)," depending on

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[6]The Eighth Circuit decision's alternative statement of the inference, that "(Plaintiff) was not going to risk a finding of employability even if he were in fact employable (p. A-24, *infra*)," places the inference within the realm of immaterial hypothetical speculation.

unknown medical facts, demonstrates that the status of Plaintiff's employability at the time of Nelson's letter was purely speculative. Kutchback was not able to make any appraisal of the plaintiff's employability without knowing the status of his medical limitations, and the very existence of Kutchback's letter to Nelson establishes that Kutchback did not have that information.

Accordingly, there was no misrepresentation of any material fact by Nelson and no "fair and proper" inference of fraud on his part could be drawn from the letter in question.[7] The defendant's

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[7]An appropriate inference from Nelson's letter is that, in deference to his client's best interests, Nelson was not going to increase the client's file expenses on the case, after it had been won, in a manner that had no prospect of benefit for his client and conceivably could result in the loss of what had been achieved. Though the jury, as lay persons, might not have appreciated this, the defense lawyer, trial judge and Court of Appeals should have.

argument, over objection, was patently improper and highly prejudicial and the Eighth Circuit's characterization of the argument as that "(defendant) merely summarized the facts and drew proper inferences therefrom," is as intolerable as Defendant's argument.[8]

**B. "Some Doubt" of Plaintiffs' Case**

The existence of some doubt over an issue of fact in a case will not support argument that the other party's counsel fraudulently contrived the case. *See London Guarantee & Accident Co. v. Woelfle*, 83 F.2d 325, at 339 (8th Cir. 1936)(doubtful question of whether fall caused aorta to rupture did not warrant counsel's argument that opposing counsel was trying to "humbug" jury); *F.W. Wool-*

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[8]Court of Appeals decision, p. A-25, *infra*.

*worth Co. v. Wilson*, 74 F.2d 439, at 442 (5th Cir. 1934)(evidence that injury was due to disease rather than broken glass ingested with an ice cream soda was not a basis to argue a "trumped up" case).

The only aspect of the Record, other than the inference previously dealt with in Point A, *supra*, that the Court of Appeals cites in support of its approval of Defendant's argument that Plaintiffs' trial counsel fraudulently contrived the case, is the decision's reference to the existence of "some doubt" that Plaintiff was injured on the defendant's St. Clair equipment company premises.[9]

The existence of doubt as to factual issues and the disputes arising therefrom constitute the reason for submitting cases

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[9]The footnote at p. 17, *supra*, discusses the Court of Appeals' erroneous perception of that aspect of the medical evidence.

to juries for decision under the guidance[10] and standards of judicial process -- it is not an excuse to abandon those standards in a manner which, as in the case at bar, uproots the very integrity of that process by preventing the jury's performance of its duty and depriving the litigants of a trial of their case on its merits.

### C. Community Conscience/Send a Message

The Eighth Circuit's decision refused to recognize Defendant's punitive charge, that the jury, the community's conscience and standard setter, "send a message" of disapproval by answering "No" to the liability-controlling special verdict, as Defendant's cashing in the prejudice and

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[10]Indeed, the existence of doubt as to factual issues is inherent in the jury's charge to decide the case on a preponderance of the evidence.

passion aroused by argument attributing fraud to Plaintiffs' trial counsel. As such, it was an integral and strategic part of Defendant's fraud argument and was designed to insure the jury's distraction from its duty to decide the case on its factual and legal merit. This aspect of the argument, employed as it was here, rises in intensity of prejudice to the level of plain and fundamental error.

The Court of Appeals's decision ignored the exceptional prejudice of the seductive appeal of the "community conscience" plea when employed against the outsider in a diversity case, as here. *Cf. Westbrook v. General Tire And Rubber Co.*, 754 F.2d 1233, 1238-1239 (5th Cir. 1985)(community conscience arguments in diversity action, condemned), *rehearing and rehearing en banc denied*, 760 F.2d 269 (1985).

Likewise shocking is the Court of Appeals' approval of the use of the "send a message" argument by attorneys who represent defendants, while at the same time acknowledging the strict prohibition against the argument's use by attorneys representing claimants in cases where punitive damages are not at issue. Surely, argument deliberately inciting punishment when no punishment is in issue is fundamentally improper and unfair, whether the offender is the claimant or the defendant. Surely, a plaintiff who has been improperly deprived of his day in court through his opponent's use of such argument is as greatly injured and as unfairly punished as is a defendant who incurs liability for greatly excessive damages. Here, the jury's encouragement to speak out on a matter that was not even

properly an issue in the case was doubly prejudicial.

Approval of such vile and improper tactics defies logic and ignores the extreme prejudice suffered by the targeted party when jurors are wrongly stirred to overreaction through motivation to demonstrate disapproval, which can result even where they may lack conviction that the verdict is justified by the evidence. *Compare Caldwell v. Mississippi*, 472 U.S. 320, at 331 (1985) (criminal sentencing case recognizing danger in a jury's motivation to "send a message" of disapproval).

In concert with Defendant's charge that Plaintiffs' trial counsel had fraudulently contrived the case, his plea to "community conscience" and exhortation to "send a message" of disapproval insured the denial of Plaintiffs' right to a fair trial.

## CONCLUSION

For these reasons, this petition for certiorari should be granted. The Eighth Circuit's decision, depriving Plaintiffs of the right to a fair trial and precedentially establishing a code of attorney conduct that condones flagrant and hostile interference with the jury process, cannot be permitted to stand. A decision not to exercise the Court's supervisory power in this matter would result in the erosion of the administration of jury trials and the traditional concepts of fair trial.

Respectfully submitted,

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June 4, 1989

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 88-1688EM

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| | | |
|---|---|---|
| Willie L. Harris, et al., Appellant | * | Appeal from the United States District Court Eastern District Of Missouri |
| v. | * | |
| Steelweld Equipment Company, Inc. Appellee. | * | |

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Submitted: December 12, 1988
Filed: March 6, 1989

Before McMILLIAN, BEAM, Circuit Judges and WHIPPLE,* District Judge.

WHIPPLE, District Judge.

This appeal is taken from a final judgment entered by the district court[1] for appellee upon the jury's answer "no"

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*The HONORABLE DEAN WHIPPLE, United States District Judge for the Western District of Missouri, sitting by designation.

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[1]The Honorable Roy W. Harper, Senior Judge, United States District Court, Eastern District of Missouri.

to a special verdict interrogatory number 1, finding for appellee on liability. Appellants, husband and wife, brought this action claiming damages for disabling back injuries allegedly incurred by appellant-husband when, while on the parking lot of the appellee's plant premises located in St. Clair, Missouri, he slipped and fell on accumulated snow and ice. Following an eight-day jury trial, the jury found in favor of the appellee on the issue of liability.

On appeal, appellants have raised four issues: (1) barring an expert witness for failure to comply with local rules, (2) improper district court participation through commentary and questioning, (3) improper cross-examination of appellants' expert witness, and (4) inflammatory closing argument.

**I. DISQUALIFICATION OF EXPERT WITNESS FOR FAILURE TO COMPLY WITH LOCAL RULE.**

Appellants filed this action on January 21, 1985. The case was originally set for trial on September 9, 1985. For various reasons, the case was reset numerous times. Finally, the case was reset for trial on June 2, 1986. On or about May 13, 1986, appellants named as an additional witness, John A. Ebert, a meteorologist, and on May 22, 1986, appellee filed its motion in limine requesting that Ebert be prohibited from testifying due to

appellants' violation of Local Rule 3.[2] Local Rule 33 became effective on or about October 16, 1985. Appellant's counsel, who is not admitted to the district court bar because of an inability to satisfy the residency requirement, did not receive notice of new Local Rule 33 and argues that he was unaware of the Rule's existence until appellee filed his motion in limine, seeking to bar expert witness Ebert.

On June 2, 1986, the scheduled trial date, counsel for appellants and appellee met in the court's chambers and it was agreed that the case would be passed due to the pendency of appellants' workers' compensation claim. At this time the court recommended that the case be taken off the trial docket until the workers' compensation case was resolved instead of being continued again. This was accomplished by stipulation. Further, counsel herein agreed that neither party would engage in any additional discovery and that the case would remain in the same posture for trial as it had been on June 2, 1986, when it was ultimately reached

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[2]Local Rule 33 requires parties to file all expert witness names 90 days prior to the date of trial and any supplements thereto at least 60 days prior to the date of trial. The rule also provides that "the expert witness named must be made available for deposition at least 45 days prior to the date of trial," and provides that "in the event a party fails to comply with this rule, the court shall prohibit that party's expert from giving expert testimony unless the court finds that such failure was beyond the control of the parties seeking to use such expert."

for trial. Counsel for appellants and appellee drafted the June 2, 1986 order which prohibited any additional discovery and disqualified Ebert for appellants' failure to comply with Local Rule 33 Appellants' Ad.3). This order was immediately presented to the court in handwritten form and was signed without further incident.

[at 869 F.2d 399]

On March 18, 1987, appellants moved the court to vacate the order disqualifying the expert witness because the case had yet to be reached for trial and all of the expert's materials, opinions and facts had been furnished to appellee and there could be no prejudice to appellee with the case off the trial docket. On September 16, 1987, after the case was returned to the docket for trial, the court held a hearing on the motion to vacate and denied the motion.

Appellants argue that under all the circumstances, including the lack of any culpability of appellants for failing to meet Local Rule 33's time limitations in June 1986, full subsequent disclosure before the case was actually reached for trial, and the resulting lack of prejudice to appellee, the court's refusal to vacate its disqualification of the witness constituted an abuse of discretion. Appellants argue that their counsel, not admitted to the district bar because of the inability to satisfy the residency requirement in place at the time, did not receive notice of new Local Rule 33 from the court or from the clerk, and was unaware of the rule's existence until the

appellee filed its motion in limine, seeking to bar the expert witness Ebert. Appellants argue that they were prejudiced at trial by this disqualification of their expert because of the lack of ability to present evidence of the nature of the ground's snow-covered conditions on the appellee's premises on the day of the accident.

Appellee asserts that counsel for appellants and appellee conferred and jointly drafted the court's June 2, 1986 order, and that appellants cannot now complain of what is actually an order that appellants' own attorney agreed to, prepared, signed, and allowed to be presented to the court for the court's signature and entry without objection.

As this court stated in Blue v. Rose, 786 F.2d 349, 351 (1986), '[i]t is fundamental that it is within the trial court's discretionary power whether to allow the testimony of witnesses not listed prior to trial. (citations omitted). A ruling by the district court pertaining to this matter will be overturned only if there is a clear abuse of discretion." In Blue v. Rose, the district court had ruled that a witness would not be permitted to testify as he had not been listed by the appellees as required by the court's pretrial order and local court rule.

Likewise, in Simplex, Inc. v. Diversified Energy Systems, Inc., 847 F.2d 1290 (7th Cir. 1988), the court excluded the testimony of plaintiff's expert witnesses because, like here, plaintiff did not comply with the local rule requiring

disclosure of expert witnesses in a timely fashion. In holding that the exclusion was not an abuse of discretion, the court explained that:

> Our rules of civil procedure are designed to facilitate the complete disclosure of all relevant information before trial in order to eliminate unfair surprise and ultimately promote accurate and just decisions.

Simplex, Inc., 847 F.2d at 1292.

Although it may appear that appellees would not be prejudiced by disclosure of this expert witness at such a late date because the case was taken off the trial docket and reset for trial, the fact remains that on June 2, 1986 when the case was reset for trial, discovery was completed and the case was to remain in the same posture when it would ultimately be reached for trial.

Further, appellants presented ample evidence of the condition of the appellee's parking lot at the time of the alleged accident, such that the failure of the meteorologist to testify cannot be said to prejudice the appellants in any manner. The appellant Willie Harris and his co-worker Mr. Guttenberger [*sic*] both testified as to the condition of the appellee's property on the day in question. Appellee did not deny the condition of the parking lot. Appellee's vice president and other employees testified that they did not recall what the weather conditions were on the day in question.

In addition, appellants introduced various climatic and meteorological records reflecting the weather conditions during the week preceding the alleged accident. Clearly there was sufficient direct evidence as to the condition of appellee's premises in this case. Appellants' argument that this other evidence of the weather conditions required
[at 869 F.2d 400]
the expert interpretation of a meteorologist to determine the snow conditions existing in appellee's parking lot is without merit.

It is inconceivable that appellants' meteorologist could supply any additional evidence as to the physical condition of appellee's parking lot if he had not seen the lot on that date. It is further doubtful that this expert could to any degree of meteorological certainty state an opinion as to the physical conditions on appellee's parking lot based on weather records and any combination of hypothetical facts.

The district court obviously did not abuse its discretion in disqualifying appellants' expert witness pursuant to Local Rule 33, and this court finds that no prejudice resulted to the appellants in their proof of the condition existing on appellee's parking lot at the time of the alleged accident.

More important, the trial court had the opportunity to hear oral arguments presented on this matter at the hearing on September 16, 1987. The rules proscribing

discovery are enacted for a reason. Once discovery has closed in a case, it is the court's discretion whether or not to allow it to be reopened. The fact that a case has been reset for trial is not automatically a justifiable reason to reopen discovery. Here, appellee's counsel agreed to continue the case only if the case remained in the same posture had it gone to trial on June 2, 1986.

Finally, appellants' counsel has a responsibility to know the local rules of every court before which he practices. It is not a justifiable excuse to claim that the court or the court's clerk did not provide a copy of a local rule when it is enacted. This procedure is a courtesy. It is not the responsibility of the local clerk's office to send copies of all local rules to attorneys not admitted to the court. An attorney's failure to keep himself informed of the Local Rules of every court in which he has pending cases is a "lack of diligence."

## II. CONDUCT OF THE TRIAL COURT.

Appellants argue that during the course of this eight-day trial, the district court judge's numerous interventions, argumentative comments, frequent displays of temper, and strident interrogation and intimidation of witnesses unduly restricted, impeded and interrupted appellants' presentation of their evidence and prejudicially conveyed to the jury a partiality in favor of appellee.

The standard of review in the Eighth Circuit regarding alleged misconduct of the district court was set forth in LaBarge Water Well Supply Company v. United States, 325 F.2d 798, 802 (8th Cir. 1963), wherein this court held that it would not reverse for alleged misconduct of the court "'unless it appears that the conduct complained of was intended or calculated to disparage the defendant in the eyes of the jury and to prevent the jury from exercising an impartial judgment upon the merits.'" Id. (quoting Goldstein v. United States, 63 F.2d 609, 613 (8th Cir. 1933)). Further, it must also be shown "that such activities prejudiced the defendant before a new trial may be ordered on such grounds." Id. (quoting Woodring v. United States, 311 F.2d 417, 420 (8th Cir.), cert. denied, 373 U.S. 913 (1963)).

Appellants have listed six instances of perceived judicial misconduct, which include: (1) during the testimony of Doug Enke, appellants' witness and appellee's employee, appellants were prohibited from

using leading questions, were required to wait a week before attempting to impeach Enke, and were criticized on "the relative fairness between counsel and the witnesses [*sic*]" (App. Brief 18); (2) during the testimony of appellants' former co-worker, Mr. Guggenberger, the trial judge unduly restricted and disrupted his testimony during direct examination; (3) the trial court unduly restricted and made unfair commentary during the direct examination of plaintiff; (4) the court unfairly castigated plaintiff's former terminal manager, Mr. Schoeck; (5) the court made improper commentary and influence over appellants' witness Mr. Kutchback; (6) the court cross-examined, disputed, rebuked and in short, discredited and intimidated appellants' economic expert witness, Dr. Stevenson.

[at 869 F.2d 401]

Appellant contends that the trial court's conduct, remarks, and questions were so biased that appellant did not receive a fair trial. Appellee, on the other hand, asserts that the district court's intervention, questions and comments were merely attempts to clarify the evidence, retain control over the trial, and in any case, appellants failed to object to the court's comments at trial and have therefore waived any complaint of alleged error.

In Warner v. Trans-America Insurance Co., 739 F.2d 1347 (8th Cir. 1984), this court set out the proper viewpoint on the trial court's role as follows:

> A trial judge should never assume the role of advocate, e.g., United States v. Gunter, 631 F.2d 583, 587 (8th Cir. 1980), and must preserve an attitude of impartiality in the conduct of a trial (citations omitted). It is also true, however, that a trial judge may question witnesses or comment on the evidence. A federal judge is more than a "mere moderator or umpire in the proceedings and he may take an active role in conducting the trial and developing the evidence," (citations omitted). In order to reserve [*sic*] on the grounds of excessive judicial intervention, the record must either "disclose actual bias on the part of the trial judge [or] leave the reviewing court with an abiding impression that the judge's remarks in questioning of witnesses projected to the jury an appearance of advocacy or partiality." United States v. Singer, 687 F.2d 1135, 1141 n.10 (8th Cir. 1982), rev'd on rehearing, 710 F.2d 431 (8th Cir. 1983). Warner, 739 F.2d at 1351.

First, as to appellants' examination of Doug Enke, it is clear that the district court did not abuse its discretion and the appellants were not prejudiced by the district court's actions. Appellants complain that counsel was prohibited from using leading questions when examining Enke, and "was criticized on the relative fairness between counsel and the witness" (App. brief, p. 18). The conversation of which appellant complains (Tr. 79, 80) took place outside the presence of the

jury and therefore did not result in any prejudice to the appellants. See Coast to Coast Stores, Inc. v. Womack-Bowers, Inc., 818 F.2d 1398, 1401-1402 (8th Cir. 1987).

Indeed, the trial court was correct in sustaining appellee's counsel's objection to the leading form of questions posed to Enke, appellants' witness on direct examination. It is part of the court's responsibility to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence to insure effective presentation. See Fed. Rule of Evid., 611(a). As for appellants' complaint that they were not allowed to impeach Enke until he was re-called a week later for cross-examination under Rule 611(c), this court fails to see how this prejudiced appellants' case in any way, or is an abuse of discretion by the trial court. Appellants were allowed to impeach Enke.[3]

Second, appellants complain that the judge unduly restricted and interrupted the presentation of witness Mark Guggen-

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[3]The subject of impeachment was whether Enke refers to a specific area of the defendant's yard as the "unloading zone or receiving zone." What Enke would refer to as one area of the yard or another is irrelevant, and any impeachment with regard to this matter would not be pertinent because there was no assertion by defendant that plaintiff was in the wrong area, or that there was not snow in certain areas on the parking lot in question.

berger, appellants' former co-worker.[4] As for restricting Guggenberger's testimony, the trial court was correct in not allowing his testimony as a expert until he was qualified. See Fed. Rule of Evid. 611(a)(1).

[at 869 F.2d 402]

As for the complaint that the court unduly disrupted Guggenberger's testimony, the record reflects on more than one occasion, the district court had to instruct Guggenberger not to volunteer testimony.[5] It is clear from the record in this case that the court's interruption and direction concerning this witness's testimony was clearly proper. See Cowens v. Siemens-Elema AB, 837 F.2d 817, 823 (8th Cir. 1988). Again, appellants did not object to the court's comments at trial and have

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[4]On direct examination, Guggenberger was asked, "Can you describe briefly for the court and jury generally what the job of a driver for Complete Auto back in February of 1980 involved?" Defense counsel objected and the court sustained the objection and ruled that if appellants' counsel wished to elicit opinion or expert testimony from Guggenberger, he would have to qualify Guggenberger first (Tr. 118). Appellants chose not to qualify Guggenberger and the court allowed appellants to question Guggenberger with regard to what he did as a driver for Complete Auto (Tr. 119-120).

[5]On one occasion, Guggenberger started gratuitously testifying while plaintiffs' counsel was marking an exhibit, and on another occasion Guggenberger answered a question and began testifying narratively (Tr. 124, 125).

therefore waived any complaint of alleged error.[6]

Third, and somewhat related, appellants complain that the court unduly restricted and made unfair commentary during the direct examination of the appellant Willie Harris. Upon review of the record in this case, it becomes painfully clear that the trial judge was attempting to have the trial conducted efficiently and clearly enough that the jury could understand the evidence and return a fair verdict. And again, appellants failed to object to the court's comments at trial and any complaint appellants have now has been waived.

As for appellants' argument that the district court unfairly "castigated" appellants' former terminal manager, Mr. Schoeck, the court finds no abuse of discretion in the record.[7] In any case,

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[6]Consequently, our review at this juncture is for plain error. Federal Rule of Civil Procedure 51. As previously noted, the court is hesitant to reverse on the basis of alleged misconduct unless it can be said that the trial judge's conduct "pervaded the overall fairness of the proceedings." Cowens, 837 F.2d at 823 (quoting United States v. Bland, 697 F.2d 262, 265 (8th Cir. 1983)).

[7]Appellant was claiming that he was not competitively employable and was claiming future wages as damages. In compliance with pretrial orders, defendant listed appellant's work records as exhibits which may be used at trial. Mr. Schoeck testified that appellee's exhibits G-6, G-7 and G-8 were business records concerning the appellant and were part of the appellant's file. These exhibits reflect that appellant missed many

appellants failed to object to the court's comments at trial and any complaint of alleged error has been waived.

Concerning Mr. Kutchback, appellants contend that the district court erred and prejudiced their case in ordering the jury out while the court lectured Kutchback in regard to lying in federal court. It is apparent from the record that the judge was trying to control the evidence and the witnesses in the courtroom and simply took the required corrective measure outside the presence of the jury in order to correct the deliberate inconsistencies in the testimony of the witness. These proceedings were held outside the presence of the jury, and there was no prejudice to appellants. Coast to Coast Stores, Inc., supra.

Finally, appellants contend that the district court discredited and intimidated appellants' economic expert witness, Dr. Stevenson.[8] The record reflects that Dr.

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days of work for health reasons prior to the date of the alleged occurrence. Any evidence which would show appellant's health and prior inability to work is clearly relevant. The court notes here that the appellant's prior back condition was a hotly-contested issue in this case. Mr. Schoeck was directed by subpoena to arrive at the court with appellant's entire file, which he failed to do. The trial court advised Schoeck that is a federal lawsuit there is no "playing around" and you must comply with a valid subpoena (Tr. 372-373).

[8]At the outset, it should be noted Dr. Stevenson's testimony concerned only the issue of the amount of damages and any alleged error on the

Stevenson was allowed to testify as to his opinions that appellant had sustained an earning loss, both past and future, and appellants introduced into evidence an exhibit prepared by Stevenson, indicating same. The district court asked Dr. Stevenson questions in an attempt to clarify for itself as well as the jury some very confusing and technical testimony. This is the district court's right, as well as its duty. See Federal Rule of Evidence 614(b). Indeed, it is entirely proper for the district court to question witnesses in order to clarify

[at 689 F.2d 403]
factual issues. See Lewy v. Remington Arms Co., Inc., 836 F.2d 1104, 1111 (8th Cir. 1988) (citing Jaeger v. Henningson, Durhamt, Richardson, Inc., 714 F.2d 773, 777 (8th Cir. 1983)). Here the trial court limited its questions to those necessary in order to clarify the factual issues and it was not the kind of continual interruption which would result in prejudice because it would lead the expert off into an irrelevant discussion or completely confuse and/or misstate what the expert said. See Champeau v. Fruehauf Corp., 814 F.2d 1271, 1275 (8th Cir. 1987).

Again, appellants did not object to the court's questions as required by Fed. Rules of Evid. 614(c) and, therefore, have

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court's part could not be prejudicial to the appellant in that the jury found the appellee not liable for appellants' damages.

waived any alleged complaint of error. Nevertheless, the court's comments were not an abuse of discretion and appellants were not prejudiced thereby. As this court stated in Lewy, supra:

> It does appear that the practice of allowing comments on the evidence by a trial judge is at considerable variance with the concept that the judge should retain and present an air of impartiality, particularly in jury trials where the jury are the fact finders. Thus, the trial court is often in the difficult position of needing to clarify the evidence while still maintaining an air of impartiality. This feat requires the judge to operate within a restricted range; but, obviously the judge must be accorded a fair measure of discretion in harmonizing the concepts of opinion comment with that of impartiality.

Lewy, 836 F.2d at 1111.

Reviewing courts employ a balancing process to determine whether the trial judge's comments have destroyed the overall fairness of the trial. Van Leirsberg v. Sioux Valley Hospital, 831 F.2d 169 (8th Cir. 1987) (quoting United States v. Bland, supra at 265).

In this case, the court is satisfied that the trial court's comments and questions concerning the witnesses and evidence, when read in context, did not destroy the overall fairness of the trial.

Indeed, this is one of those circumstances in which "[w]e ... recognize that there may well be situations where a judicial comment is necessary and proper." Lewy, 836 F.2d at 1111. Our review reveals that there is simply no evidence that the district court became an advocate in this trial, nor is there any evidence that appellant was prejudiced by the limited number of questions and comments the court did make. Further, the court's intervention in this case was necessary in order to expedite the presentation of the evidence. This is entirely clear from the record of this eight-day trial of a slip-and-fall case.

## III. CROSS EXAMINATION OF EXPERT WITNESS.

During appellee's counsel's cross-examination of appellants' expert rehabilitation witness, David Kutchback, counsel inquired about a letter written by Mr. Kutchback to Mr. Nelson, appellants' workers' compensation lawyer. Appellants' lawyer objected to this cross-examination on the basis of hearsay. Appellee's counsel maintained that he was questioning appellants' expert in regard to what appellants' attorney, Mr. Nelson, stated to the expert. Mr. Nelson's statements are admissions by a party opponent and are clearly admissible pursuant to Federal Rule of Evidence 801(d)(2)(D).[9]

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[9]Federal Rule of Evidence 801(d)(2)(D) provides:

> A statement is not hearsay if the statement is offerred [*sic*] against a party and is a statement by the party's agent or servant

The standard of review in regard to the district court's evidentiary rulings require a finding that there has been "a clear abuse of discretion." Adams v. Fuqua Industries Inc., 820 F.2d 271, 273 (8th Cir. 1987). Here, if the district court had sustained appellants' objection, it would have been a clear abuse of discretion requiring reversal. Mahlandt v. Wild Canid Survival and Research Center, Inc., 588 F.2d 626 (8th Cir. 1978). See also, Russell v. United Parcel Service, 666 F.2d 1188 (8th
[at 869 F.2d 404]
Cir. 1981); U.S. v. Margiotta, 662 F.2d 131 (2d Cir. 1981).

Second, cross-examination of Mr. Kutchback with the letter was proper for impeachment purposes. At the time appellant objected to cross-examination of Mr. Kutchback upon the letter on the basis of hearsay, counsel for appellee stated that such testimony went to the witness's credibility.[10] The cross-examination as to

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concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

[10]Mr. Kutchback had testified on direct examination that appellant was not competitively employable at the present time. On cross-examination, appellee's counsel asked Mr. Kutchback if Mr. Nelson had "communicated with him," and "did Mr. Nelson say anything to you" concerning the employability of the appellant (Tr. 501-502). The letter at issue was written in 1983 by Mr. Kutchback to Mr. Nelson and indicated that it was a possibility that appellant could be employable and as a result of this letter, Mr. Kutchback was taken off the

Mr. Kutchback's prior opinions and the consequences thereof are clearly relevant to show credibility and/or bias.

## IV. INFLAMMATORY CLOSING ARGUMENT.

As a final ground of error, appellant contends that appellee's counsel's improper, inflammatory closing arguments, left uncorrected by the trial court, deprived appellants of a fair trial. In his closing argument, appellee's counsel first discussed appellant's prior back condition (a hotly contested issue in this case) and then argued that the inconsistent testimony of the rehabilitation expert concerning whether appellant was competitively employable indicated that perhaps appellant had been manipulated in this litigation.[11] Appellant argues that

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case for almost two and one-half years until Mr. Nelson's predecessor [*sic*], appellants' trial attorney, contacted him. Thus, Mr. Kutchback was cross-examined by appellee's counsel as to statements made by him to Mr. Nelson and these statements are contrary to his testimony on direct. Clearly, this cross-examination was relevant. Mr. Kutchback testified that appellant could not work.

[11]Specifically, appellant argues that appellee's counsel springboarded to the unfounded theme that appellant, although a fraud, was an innocent pawn of corrupt, unethical counsel. That portion of appellants'[*sic*] closing argument which appellant complains about is:

> Mr. Walters [*sic*] (appellee's counsel): He gets lawyers, he gets a doctor. He even gets a rehab expert. And when I say "he," what happens sometimes, ladies and gentlemen, is that somebody may have been an honest person or somebody who went in and

was simply seeking some treatment and get better, all of a sudden, some lawyers get involved and their getting better takes a side seat to maybe winning a lotter [*sic*]. And after the lawyers get involved, then it's, I didn't have any problem before, then I was fine, I was fine (Tr. 741).

* * *

Then he gets, the plaintiff's lawyer gets what they call a rehabilitation specialist, Mr. Kutchback. I'll say this for Mr. Kutchback, at least he was honest enough to 'fess up to what was attempted to be done.

Mr. Kaseberg (appellants' counsel): I object, Your Honor, I don't know if that's an accusation against me, my client or what.

Mr. Walters [*sic*]: He'll know what the accusation is when I'm ready to level it, all right? What I'm talking about here, ladies and gentlemen, is a rehab specialist hired by plaintiff's attorney. The rehab specialist tells the plaintiffs' lawyer, look, I think I can get this guy back to work. And what does he do, what does this Mr. Nelson do? Mr. Nelson takes him, takes him off . . .

Mr. Kaseberg: Your Honor, that has nothing to do with this case.

Mr. Walters [*sic*]: Mr. Nelson had a lot to do with this case.

The Court: Be overruled. Let's proceed. The jury will have to recall the testimony.

Mr. Walters [*sic*]: Mr. Nelson takes the guy off the case, as I put it, he fires him, says I don't want you to put him [the plaintiff] back to work. Keep him off work. Don't let him work: the lotteries,

there was no factual basis for appellee's counsel's inflammatory argument and it had no purpose other than to arouse resentment and prejudice in the jury. Appellant argues that the closing argument of appellee's counsel is a natural outgrowth of the district court's error of allowing inadmissible hearsay testimony, the letter, over objection. This issue was dealt with previously, above.

The standard of review in assessing whether the district court abused its discretion
[at 869 F.2d 405]
in overruling appellants' objection to defense counsel's closing argument was set forth in Vanskike v. Union Pacific Railroad Co., 725 F.2d 1146, 1149 (8th Cir. 1984) wherein this court held that:

> Closing arguments are made under the direct control of the trial court. Argument of counsel is a procedural question to be determined by federal law (citations omitted). Under federal law, considerable discretion is given to the trial court to control arguments (citations omit-

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ladies and gentlemen. They want to come in here, throw figures up like this. Keep the guy off work. What's the guy [plaintiff] supposed to do? I don't necessarily blame Mr. Harris. What's he supposed to do? He's got the lawyers telling him don't go back to work, we can relate this up to an incident you say happened at Steelweld and we'll go to a jury and ask them to give you $2,000,000. we'll take our percentage, you go home and we'll give you a good shake (Tr. 743-744).

ted). The standard of review of review on appeal is clear. "The district court is in a better position to determine whether prejudice has resulted from closing argument, and the appellate court will not disturb the district court's ruling unless there has been an abuse of discretion." Vanskike v. ACF Industries, Inc., 655 F.2d 188 (8th Cir. 1981) (quoting McDonald v. United Airlines, Inc., 365 F.2d 593 (10th Cir. 1966)).

Further, "to constitute reversible error, statements made in oral arguments must be plainly unwarranted and clearly injurious." Vanskike v. Union Pacific Railroad Co., 725 F.2d at 1149 (emphasis added). In this case, appellee's counsel's closing argument was supported by the evidence and the district court's overruling of appellant's objection thereto was not an abuse of discretion.[12]

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[12]It must be remembered that at trial appellants' counsel called Mr. Kutchback as an expert witness and Mr. Kutchback testified on direct that Bob Nelson, appellant's workers' compensation lawyer, had referred appellant to him on September 17, 1981 (Tr. 473, 476-477). Mr. Kutchback testified that at that time his opinion was that appellant was not competitively employable due to his present physical condition (Tr. 478). In addition, Mr. Kutchback testified at trial that it was his opinion that at the present time, appellant was still not competitively employable (Tr. 486).

On cross-examination, the appellants' counsel questioned Mr. Kutchback in regard to the letter between Kutchback and Nelson which reflected that

A fair and proper inference from the testimony of Mr. Kutchback regarding Mr. Nelson's statements, is that in 1983, two years after the occurrence, appellant, by and through his agent, Mr. Nelson, was thwarting any effort to secure employment for himself. Appellants' own expert testified that Mr. Nelson stated to him: "We really don't want to set aside what we've been fortunate enough to obtain for this man." (Tr. 499-503). The inference from this statement is that appellant was not going to risk a finding of employability even if he were in fact employable. This inference is supported by the fact that appellant did not report to two of his treating physicians that he fell at appellee's premises and reported to Dr. Cole that he fell at another location. Indeed, there is ample evidence in the record to support appellee's counsel's characterization of these events during closing argument.

This court has held that argument describing the appellants' case as false and fraudulent is proper if facts supporting that conclusion are developed at trial. Sanden v. Mayo Clinic, 495 F.2d 221 (8th Cir. 1974). Such closing argument is proper if "supporting facts were developed at trial and the conclusions, if such evidence was believed, was at least a permissible one." Sanden v. Mayo Clinic, 495 F.2d at 227. Further, it is signifi-

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in 1983, after Kutchback suggested to Nelson that appellant might be capable of employment, Nelson took Kutchback off the case.

cant that appellant's counsel has not argued another interpretation of the evidence.

A careful examination of the closing argument in the instant case reflects that counsel for appellee merely summarized the facts and drew proper inferences therefrom. The evidence of possible fraud with regard to the circumstances of Mr. Kutchback's involvement with appellants' prior counsel is reinforced by the medical evidence developed during trial which clearly indicate there was some doubt as to whether appellant was ever injured on appellee's property. Indeed, the credibility of Mr. Kutchback was properly called into question during appellee's counsel's cross-examination. Thus, it was not an abuse of discretion to overrule appellant's objection to appellee's closing argument as ample supporting facts were developed at trial to support appellee's counsel's argument and
[at 869 F.2d 406]
the conclusion to be drawn therefrom, referenced in appellee's closing argument, is permissible.

Finally, appellants argue that it was improper for counsel for appellee to state to the jury that they should set the standard for the community when they return a verdict of no liability in the instant case. Specifically, appellee's counsel stated:

> It's a difficult thing to do, but I'm asking you to do that, write "no," and you send the message, I'm not only talking about this little

> courtroom with these people, I'm telling you that if this goes out, you set the standards for our community. You six people will set the standards in this case and the next case that's tried. These are the standards that are set, and I'm asking you to do the difficult thing, ladies and gentlemen, write down simply "no" on that verdict form (Tr. 747).

Appellant argues that the extreme resulting prejudice to appellant is plain as appellee's counsel linked this "send a message" argument to the jury's "no" answer to the special verdict controlling liability in the case. Appellant argues that this defeated the special verdict's purpose of focusing the jury's decision exclusively on the material facts of the case. Appellant argues that although appellant's counsel made no objection, the inexcusability of the plea and the resulting prejudice to appellants is so egregious as to constitute fundamental error and require reversal.

When considering alleged prejudicial effects of argument, this court has held:

> It is fundamental that, this court will refuse to consider a question which is raised for the first time on appeal and which was never presented to nor passed upon by the district court.

Harris v. Zurich Insurance Co., 527 F.2d 528, 532 (8th Cir. 1975)(citing to and quoting from Ludwig v. Marion Labora-

tories, Inc., 465 F.2d 114, 117 (8th Cir. 1972)).

Appellants concede that no objection was made to appellee's closing argument and in an attempt to avoid this fundamental rule of trial and appellate procedure, have cited case law for the proposition that defense counsel's argument constitutes "fundamental error."[13] Appellant's contention is without merit and the case law relied upon is inapplicable. At any rate, appellants failed to

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[13]Appellant has cited two federal cases, Vanskike v. ACF Industries, Inc., supra, and San Antonio v. Timko, 368 F.2d 983, 986 (8th Cir. 1966), and two Missouri cases, Fisher v. McIlroy, 739 S.W.2d 577, 582 (Mo. App. 1987) and Smith v. Courter, 531 S.W.2d 743, 748-749 (Mo. Banc 1976). Appellant cites these cases for the proposition that defense counsel's closing argument constitutes fundamental error. First, the law and facts of Timko are not on point. Vanskike, supra, Fisher, supra, and Smith, supra, stand for the proposition that a complaining party may not request a jury to award punitive damages unless punitive damages have been pled and there is evidence in the record to support the submission of the issue of punitive damages to the jury. The courts have reasoned that arguments by the complaining party's counsel which suggest to the jury that the verdict will deter others and/or punish the defendant are, in effect, arguments requesting that the jury award punitive damages. Without pleading punitive damages and proof thereof, the courts have held that it is reversible error for the complaining party's attorney to utilize a "send a message" argument because the evidence will not support the argument for an award of punitive damages. This proposition is not applicable to defense counsel's argument. Appellee's counsel was not requesting that the jury award punitive damages. Appellants realized this at trial and did not object to the argument.

raise this alleged point of error at trial and have, therefore, waived any objection thereto. Harris v. Zurich Insurance Co., 527 F.2d at 532.

**CONCLUSION.**

In accord with this opinion, the judgment and the order of the district court are hereby affirmed.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF MISSOURI**
**EASTERN DIVISION**

| | | |
|---|---|---|
| WILLIE HARRIS and DOROTHY HARRIS, | ) | [Stamped: FILED NOV 19 1987] |
| Plaintiffs, | ) | |
| vs. | ) | Cause No. 85140C(A) |
| STEELWELD EQUIPMENT CO. INC., | ) | |
| Defendant. | ) | |

JUDGMENT

This action came for trial before the Court and a jury, the Honorable Roy W. Harper, U.S. District Judge, presiding. The issues having been duly tried, the jury returns a verdict in accordance with interrogatories in favor of the defendant Steelweld Equipment Co., Inc., and against the plaintiffs Willie Harris and Dorothy Harris.

IT IS ORDERED AND ADJUDGED that the plaintiffs take nothing by their cause of action, that the action be dismissed on the merits, and that the defendant recover of the plaintiffs, its costs of action.

EYVON MENDENHALL, CLERK

By Deputy Clerk

Dated Nov. 19. 1987.